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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. THOMAS MICHAEL WAGNER, Defendant and Appellant.	2d Crim. No. B205464 (Super. Ct. No. F263041) (San Luis Obispo County)

Thomas Michael Wagner appeals an order determining him to be a sexually violent predator ("SVP") and committing him to the Department of Mental Health ("Department") for an indeterminate term of treatment. (Welf. & Inst. Code, § 6600 et seq.)[1] We affirm.

FACTS AND PROCEDURAL HISTORY

On January 17, 2006, the San Luis Obispo County prosecutor filed a petition to extend Wagner's commitment as an SVP pursuant to section 6600 et seq. The prosecutor alleged that on March 16, 2005, Wagner was found to meet the statutory criteria for an SVP commitment, and the commitment would expire on June 4, 2006.

At trial, Doctor Robert Owen, a clinical psychologist, testified that he interviewed Wagner twice and reviewed police reports, probation reports, transcripts of

[1] All further statutory references are to the Welfare and Institutions Code unless stated otherwise.

court proceedings, and Wagner's hospital records. He opined that Wagner suffers from severe pedophilia and a narcissistic personality. Owen also opined that Wagner met the statutory SVP criteria, including the likelihood of engaging in sexually violent predatory behavior if released.

Doctor Christopher North, a clinical psychologist, interviewed Wagner and opined that he suffers from pedophilia, hebephilia, a depressive disorder, and a personality disorder. North also opined that Wagner met the statutory criteria of the SVP law.

Doctor Robert Halon, a forensic psychologist, interviewed Wagner and opined that he is not a pedophile because he is not attracted to children younger than 13 years old. Halon opined that Wagner did not meet the statutory criteria of the SVP law.

Wagner testified that he participated in sex offender treatment at the hospital, but did not complete the program. He stated that he has developed spiritually and emotionally and is involved with music, art, and religion. Wagner also testified that he has planned for his release by developing a relapse-prevention plan that involves attendance at meetings for sexual addicts, frequent participation in religious activities, prayer, and counseling.

The parties stipulated at trial that Wagner was convicted of predatory sexually violent crimes in 1973, 1985, and 1991.

Between the filing of the recommitment petition and Wagner's trial, the Legislature and then the electorate amended the SVP Act, section 6600 et seq. ("Act"). The amended Act provides that an individual who is determined to be an SVP must be "committed for an indeterminate term to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility." (§ 6604.) Once committed, the individual shall receive an annual examination of his mental condition. (§ 6605, subd. (a).) After the examination, the Department must file a report with the trial court stating whether the individual continues to meet the definition of an SVP or whether his conditional or unconditional release would adequately protect the

community. (*Ibid.*) The individual may petition the trial court, however, for conditional or unconditional release without the "recommendation or concurrence" of the Department. (§ 6608, subd. (a); *id.*, subd. (c).) He is entitled to the assistance of counsel in preparing and filing the petition. (*Id.*, subd. (a).)

As a result of the 2006 amendments, an SVP remains committed, either fully or in a conditional release setting, "until he successfully bears the burden of proving he is no longer an SVP or the Department of Mental Health determines he no longer meets the definition of an SVP." (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1287.) An SVP's petition that is not authorized by the Department is decided by the court without a jury. (§ 6608, subd. (d).) The trial court applied the amended Act to Wagner's recommitment proceeding.

On December 11, 2007, the jury found, beyond a reasonable doubt, that Wagner is an SVP within the meaning of section 6600 et seq. Following trial, Wagner filed a motion challenging the recommitment petition on constitutional grounds. He asserted that the 2006 statutory amendments to the Act violate his constitutional rights to due process of law, equal protection of the law, and protection against ex post facto laws. The trial court denied the motion and on January 24, 2008, ordered him recommitted to the Department for an indeterminate term of treatment.

Wagner appeals and contends that: 1) the statutory amendments deny him due process of law; 2) the statutory amendments deny him the equal protection of the law; 3) the trial court lacked jurisdiction to hold the recommitment proceedings; and 4) he was illegally committed because the handbook the Department uses in evaluating prospective SVP's was not adopted as a regulation pursuant to the Administrative Procedure Act (Gov. Code, § 11340 et seq.). Wagner rests his arguments upon the federal and California Constitutions.

Many of the issues that Wagner raises here are pending before our Supreme Court in *People v. McKee* (2008) 160 Cal.App.4th 1517, review granted July 9, 2008, No. S162823; *People v. Johnson* (2008) 162 Cal.App.4th 1263, review granted

August 13, 2008, No. S164388; *People v. Riffey* (2008) 163 Cal.App.4th 474, review granted Aug. 20, 2008, No. S164711; *People v. Boyle* (2008) 164 Cal.App.4th 1266, review granted Oct. 1, 2008, No. S166167; and *People v. Garcia* (2008) 165 Cal.App.4th 1120, review granted Oct. 16, 2008, No. S166682.

DISCUSSION

I.

Wagner argues that the amended Act violates due process of law afforded by the federal and state Constitutions because following his indeterminate commitment, he will bear the burden of establishing by a preponderance of the evidence that he no longer presents a danger to others within the meaning of the Act. (§§ 6608, subds. (d), (i).) He relies in part upon the Supreme Court decisions in *Addington v. Texas* (1979) 441 U.S. 418, 432-433 [state must establish insanity and dangerousness warranting confinement by clear and convincing evidence]; *Jones v. United States* (1983) 463 U.S. 354, 370 [Constitution permits confinement of insanity acquittee until restoration of his sanity]; and *Foucha v. Louisiana* (1992) 504 U.S. 71, 79 [due process requires constitutionally adequate procedures to continue confinement of civil committee]. Wagner asserts that the amended Act makes it difficult for a committee to obtain release from indefinite commitment in circumstances not involving Department-authorized petitions. We disagree. In view of the statutory requirement that the state initially prove an SVP's status beyond a reasonable doubt, Wagner constitutionally bears the burden of proving by a preponderance of the evidence that he no longer presents a danger to others by reason of his mental disorder.

In *Jones v. United States*, *supra*, 463 U.S. 354, 363-368, the Supreme Court considered two important factors regarding indefinite civil commitment. First, it considered dangerousness as established by a criminal conviction obtained by proof beyond a reasonable doubt. (*Id.* at pp. 363-365.) Second, it considered mental illness as established by a preponderance of the evidence that the acquittee was insane at the time of his act. (*Id.* at pp. 366-368.) Here the jury made similar findings at Wagner's recommitment hearing. In determining that Wagner was an SVP, the jury necessarily

found by proof beyond a reasonable doubt that he: 1) had been convicted of committing sexually violent offenses against one or more victims; 2) had a diagnosed mental disorder, and 3) as a result of that diagnosed mental disorder, is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory behavior. Thus the jury found that Wagner was both dangerous and mentally ill by evidence established beyond a reasonable doubt. As recognized in *Jones*, due process is flexible and calls for different procedural protections in different situations. (*Id.* at pp. 367-368.)

Foucha v. Louisiana, *supra*, 504 U.S. 71, prohibits the continued confinement of an insanity acquittee who is no longer mentally ill, particularly where the state has not proven by clear and convincing evidence that the individual presents a danger to the community. *Foucha* does not address the burden of proof that would apply at a future release hearing, after the state already has proven beyond a reasonable doubt that the individual is mentally ill and dangerous. It does not support Wagner's contention that section 6608 unconstitutionally requires him to prove by a preponderance of the evidence that he is entitled to release because he no longer meets the SVP criteria.

Moreover, the amended Act sufficiently protects Wagner's due process rights after his initial commitment. His burden of proof by a preponderance of the evidence is the same burden of proof that the Supreme Court implicitly approved in *Jones v. United States*, *supra*, 463 U.S. 354, 356-357, 366-368, 370, for insanity acquittee review hearings. As the *Jones* review hearing is analogous to a petition for release pursuant to the amended Act, we are satisfied that the burden placed on Wagner to prove his right to release by a preponderance of the evidence in hearings involving petitions not authorized by the Department does not violate his constitutional rights to due process of law.

II.

Wagner asserts that the amended Act denies him equal protection of the law as afforded by the federal and California Constitutions, because he was committed for an indeterminate term and bears the burden to establish, without benefit of a jury trial, that he no longer meets the SVP criteria. In contrast, he points out that persons committed under other civil commitment statutes are committed for fixed terms and receive the benefit of jury trial at which the state bears the burden to prove that their commitments must be extended. Wagner argues that persons committed under the Act, the Mentally Disordered Offender Act (Pen. Code, § 2690 et seq.) ("MDO's"), persons found not guilty by reason of insanity (*id.*, § 1026 et seq.) ("NGI's"), and persons committed under the Lanterman-Petris-Short Act (§ 5000 et seq.) ("LPS's") are similarly situated for purposes of evidentiary burdens and jury trial rights in recommitment proceedings. He adds that the reviewing court must strictly scrutinize involuntary civil commitment schemes because they affect a fundamental liberty interest. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1153, fn. 20; *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155-1156 [a legislative distinction that "involves a suspect classification or infringes on a fundamental interest . . . is strictly scrutinized and is upheld only if it is necessary to further a compelling state interest"].)

We reject Wagner's arguments. The contention that SVP's are similarly situated to MDO's, NGI's, and LPS's overlooks significant differences in the commitment schemes and their purposes concerning the degree and danger that persons committed under the respective schemes present. The contention also ignores the severity of mental illness, prognosis, and amenability to treatment of persons in the different groups. The Act concerns "'a small but extremely dangerous group of sexually violent predators . . . .'" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Other commitment schemes involve a broad range of mental illness and related conduct, e.g., LPS's include persons who have not committed any crime. (§ 5300.5, subd. (b).)

Moreover, an SVP is civilly committed in part because of the likelihood that he will engage in sexually violent criminal behavior upon release. SVP committees present a substantial danger to others, have a very high recidivism rate, require long-term treatment, and have only a limited likelihood of improvement. Committees under the other statutory schemes include those suffering mental illnesses of short duration with greater potential to be successfully treated with medication or other treatment. (See, e.g., *People v. Buffington*, *supra*, 74 Cal.App.4th 1149, 1163 [determining that SVP's and MDO's are not similarly situated for purposes of equal protection based upon differing treatment requirements].)

Even if we were to assume that the committee groups are similarly situated, their disparate treatment furthers a compelling state interest. SVP's receive an indeterminate term of civil commitment because they are less likely to be cured and more likely to reoffend than other civil committees. The law deems them more dangerous than persons who are committed under other civil commitment schemes. "The problem targeted by [the former Act] is acute, and the state interests - protection of the public and mental health treatment--are compelling." (*Hubbart v. Superior Court*, *supra*, 19 Cal.4th 1138, 1153, fn. 20.) The purpose of the amended Act is to protect the civil rights of the SVP committee and at the same time, protect society and the system from unnecessary or frivolous jury trials when there exists no competent evidence to suggest a change in the committee. (*Bourquez v. Superior Court*, *supra*, 156 Cal.App.4th 1275, 1287.) The particular dangers that SVP's present and their limited success in treatment justify the state treating them differently from other civilly committed persons. We conclude the disparate treatment does not offend federal or state constitutional guarantees of equal protection of the law.

III.

Wagner contends that the trial court lacked jurisdiction to hold recommitment proceedings or to impose an indeterminate term. He asserts the court erred by applying the amended Act to him because the amendments do not contain

provisions permitting recommitment of a previously committed SVP. Alternatively, Wagner argues that the two-year extension period of the former Act applies to him because the amendments may not apply retroactively. He claims that *People v. Carroll* (2008) 158 Cal.App.4th 503, 508-510, 512-515, *Bourquez v. Superior Court*, *supra*, 156 Cal.App.4th 1275, and *People v. Shields* (2007) 155 Cal.App.4th 559, judicial decisions rejecting similar contentions, are wrongly decided.

As Wagner concedes, several judicial decisions have rejected the jurisdiction and retroactivity arguments made here. We agree with and adopt the reasoning of these decisions. We conclude that the trial court had jurisdiction to conduct the trial and commit Wagner for an indeterminate term of treatment under the amended Act. Moreover, the indeterminate commitment does not constitute a retroactive application of the amended Act.

IV.

By supplemental brief, Wagner asserts that his commitment is illegal because the protocol employed by the Department in evaluating SVP's was not adopted as a regulation pursuant to the Administrative Procedure Act (Gov. Code, § 11340 et seq.).

Section 6601, subdivision (c) requires the Department to evaluate a sex offender "in accordance with a standardized assessment protocol, developed and updated by the [Department], to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." Subdivision (d) of that section requires the Department to evaluate the sex offender by two practicing psychologists or psychiatrists and, upon their concurrence that the person evaluated is an SVP, to request the prosecutor to commit him pursuant to section 6600 et seq.

Consistent with the requirements of section 6601, subdivision (c), the Department published a protocol for use by evaluators in evaluating persons for SVP commitment. Recently, the Office of Administrative Law determined that the protocol, in material parts, was a regulation that the Department did not adopt according to procedures in the Administrative Procedure Act. As a result, Wagner and others were evaluated by psychologists or psychiatrists using an "underground" regulation. (Cal. Code Regs., tit. I, § 250.)

Nevertheless, the Department's failure to comply with the requirements of the Administrative Procedure Act does not invalidate the order of recommitment. By analogy, our Supreme Court has held that defects in the preliminary hearing stage of a criminal prosecution do not invalidate the subsequent conviction unless the defendant establishes prejudice from the defect. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530.) "The presence of a jurisdictional defect which would entitle a defendant to a writ of prohibition prior to trial does not necessarily deprive a trial court of the legal power to try the case if prohibition is not sought." (*Id.* at p. 529.) For example, the failure to obtain evaluation by two mental health professionals, as required by section 6601, subdivision (d), does not deprive the trial court of fundamental jurisdiction to determine an SVP petition. (*People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1128-1131.) In those circumstances, the defect does not concern "the substantive validity of the complaint." (*Id.* at p. 1128.) Likewise, the defect in the adoption of the evaluation protocol did not prevent the trial court from acting on the SVP petition here. We do not believe that the Legislature intended that either an SVP petition or a determination by the trier of fact that a sexual offender is an SVP should be invalidated because the public participation interests in the Administrative Procedure Act have not been vindicated. (*Id.* at p. 1131 ["We cannot believe the Legislature intended an offender who has previously been adjudicated an SVP, and who in the opinion of the requisite evaluators is still dangerous, must be released only because a petition was filed prematurely"].)

Moreover, Wagner has not established prejudice from the Department's use of an underground regulation in his evaluations. At best, he speculates that the Department might adopt a materially different protocol that would result in a more favorable evaluation regarding his mental disorder.

The order is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J

COFFEE, J.

John A. Trice, Barry T. LaBarbera, Judges

Superior Court County of San Luis Obispo

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.